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No. 00-1355

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

RICHARD GANULIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS JEFFREY NIEMER, PATTY HEMSATH, AND ANNE DOLAN

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QUESTION PRESENTED

Whether the designation of Christmas as a federal holiday is so plainly consistent with the Establishment Clause of the First Amendment that this Court should affirm that designation by summary disposition on the merits. *See, e.g., Stone* v. *Graham*, 449 U.S. 39 (1980) (per curiam).

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BRIEF IN OPPOSITION OF RESPONDENTS JEFFREY NIEMER, PATTY HEMSATH, AND ANNE DOLAN

Respondents Jeffrey Niemer, Patty Hemsath, and Anne Dolan, federal employees and intervenors-appellees below, respectfully submit this brief in opposition to the Petition for Writ of Certiorari filed by Petitioner Richard Ganulin, plaintiff-appellant below.

REASONS FOR DENYING THE WRIT

I. PLENARY REVIEW IS UNNECESSARY.

The decision below is an unpublished affirmance of a district court decision upholding the designation of Christmas as a federal holiday. It neither conflicts with any decisions of this Court, nor creates or exacerbates any meaningful split of authority among the circuits, and the Petition for Writ of Certiorari contains no claim to the contrary. Under the Rules of this Court, plenary review is plainly unnecessary. *See* Rule 10.

II. SUMMARY DISPOSITION ON THE MERITS IS APPROPRIATE.

Instead, the Court should decide this case by summary disposition on the merits. *See* Rule 16.1; *see, e.g., Stone* v. *Graham*, 449 U.S. 39 (1980) (per curiam). The federal statute at issue in this case—which declares legal holidays on various days, including Christmas, and gives all federal employees the day off on those days—is unmistakably constitutional. Governments, always and everywhere, have marked in law culturally significant days and accommodated their voluntary celebration; culturally significant days, always and everywhere, include religious and nonreligious celebrations alike.

In *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), this Court emphasized that a government nativity scene could constitutionally be displayed so long as its context made clear that it was merely one cultural offering among many. Similarly, in *County of Allegheny* v. *American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), this Court stressed that a menorah could constitutionally be displayed because its particular context indicated that it was but one item in a larger display celebrating cultural diversity. Context, of course, may be temporal as well as spatial. And

the appropriate context for evaluating governmental celebration of cultural holidays—whether with displays or with declarations or proclamations—consists of the government's other cultural offerings throughout the year. *Cf. Capitol Square Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) ("the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.") (O'Connor, J., concurring). So long as that context demonstrates that the government is simply *acknowledging* or *accommodating* a popular holiday in the culture, the Establishment Clause is easily satisfied. This is true, moreover, whether the question is considered under the coercion analysis of *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992), the endorsement analysis of *Santa Fe Indep. Sch. Dist.* v. *Doe*, 120 S. Ct. 2266, 2278, 282-83 (2000), or the tripartite test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971).

By granting summary disposition on the merits—and making this reasoning unmistakably clear, once and for all—the Court could provide needed clarity to its public holiday cases and direction to the lower courts.[1]

III. THE FEDERAL CHRISTMAS HOLIDAY IS PERMISSIBLE GOVERNMENT CULTURAL EXPRESSION.

The ubiquitous government practice of instituting legal holidays in recognition of cultural festivals, such as the Christmas holiday at issue here, is a manifestly constitutional form of government expression.

The Constitution generally affords state and federal

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[1]Summary disposition is also appropriate for Petitioner's Freedom of Association and Equal Protection claims. *See McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961).

governments plenary control over their own speech, and makes them primarily accountable to the electorate, not the judiciary, for the positions they express. *See Board of Regents of Univ. of Wis. Sys.* v. *Southworth,* 120 S. Ct. 1346, 1357 (2000); *Rust* v. *Sullivan,* 500 U.S. 173, 192-95 (1991). Subject to the First Amendment's prohibition on government expression that tends to establish religion, and to other narrow exceptions, the government may speak as it chooses.

Among the many permissible subjects of government expression are the cultural aspects of religion. In fact, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch* v. *Donnelly,* 465 U.S. 668, 674 (1984). Examples of these acknowledgements abound. *E.g., id.* at 675-678; *Marsh* v. *Chambers,* 463 U.S. 783, 792 (1983); *see also School Dist. of Abington Twp.* v. *Schempp,* 374 U.S. 203, 225 (1963) (noting that government schools may teach non-devotional courses on the Bible or religion, and that such courses are commendable).

Most notable for present purposes, the Court in *Lynch* emphasized in dicta that the government is permitted to declare national holidays on religious holidays, without redefining them as secular:

> Beginning in the early colonial period long before Independence, a day of Thanksgiving was celebrated as a religious holiday to give thanks for the bounties of Nature as gifts from God. President Washington and his successors proclaimed Thanksgiving, with all its religious overtones, a day of national celebration and Congress made it a National Holiday more than a century ago. That holiday has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance.

> Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. *And, by Acts of Congress, it has long been the practice that federal employees are released from duties on these National Holidays, while being paid from the same public revenues* that provide the compensation of the Chaplains of the Senate and the House and the military services. Thus, it is clear that Government has long recognized—indeed it has subsidized—holidays with religious significance.

Id. at 675-76 (footnotes, citations omitted, emphasis added). Moreover, although the Court was divided over the crèche at issue in *Lynch*, even the dissenting justices opined that "public designation of Christmas day as a holiday is constitutionally acceptable." *Id.* at 710 (Brennan, J., joined by Marshall, Blackmun and Stevens, JJ., dissenting).

In short, if government is to mark and make room for cultural celebrations generally—and one can scarcely conceive of a government that does not—some government holiday expressions will necessarily include religious elements.[2]

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[2]Nor could it be otherwise in a free society. This Court has recognized that the human quest for truth and transcendence is ubiquitous. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (recognizing "the religious nature of our people," and that "the spiritual needs of man" give rise to so "wide a variety of beliefs and creeds"); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."). *See also* MIRCEA ELIADE, THE QUEST: HISTORY AND MEANING IN RELIGION 8-9, 68 (1969) (historian of religion describing human beings as "*homo religiosus*"); MAX SCHELER, MAN'S

Government expression may thus *acknowledge* or *reflect* the broader culture, including its religious elements, *Marsh*, 463 U.S. at 792 (permitting government religious expression as "acknowledgment of beliefs widely held among the people of this country"), so long as it does not establish religion. That is, government may freely recognize the role of religion in society, so long as it does not coerce compliance with religion, *Lee*, 505 U.S. at 587, proselytize for or "endorse" it, *Santa Fe*, 120 S. Ct. at 2278,[3] or otherwise become overly entangled with it, *Lemon*, 403 U.S. at 613-14.

PLACE IN NATURE 36-37 (H. Meyerhoff trans. 1961) (philosophical anthropologist identifying "openness to the world," or capacity for transcendence, as distinguishing characteristic of human beings). This religious impulse necessarily finds expression in the broader culture, including in the form of regularly recurring, wholly voluntary, cultural celebrations that signify the extraordinary meaning of certain occasions. *See, e.g., McGowan*, 366 U.S. at 450 (describing Sunday as a "day apart from all others"); *cf.* VICTOR W. TURNER, THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE 96-97 (1969) (cultural anthropologist discussing phenomenon of *communitas*, or collective departure from normal course of life to express special meaning and preserve social order).

[3]These two risks appear most likely to materialize where the religious expressions occur in the context of a primary or secondary public school. *See, e.g., Santa Fe Indep. Sch. Dist.* v. *Doe*, 120 S. Ct. 2266 (2000); *Lee* v. *Weisman*, 505 U.S. 577 (1992); *Edwards* v. *Aguillard*, 482 U.S. 578 (1987); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985); *Stone* v. *Graham*, 449 U.S. 39 (1980); *School Dist. of Abington Tp.* v. *Schempp*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962).

A. The federal Christmas holiday involves no religious coercion by the government.

This Court long ago put to rest the notion that government closure on religious holidays was somehow coercive. In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court emphasized that the government

> *may not coerce* anyone to attend church, to observe a religious holiday, or to take religious instruction. *But it can close its doors or suspend its operations* as to those who want to repair to their religious sanctuary for worship or instruction.

Id. at 314 (emphasis added).

B. The federal Christmas holiday involves no religious proselytizing or endorsement by the government.

In assessing whether government has impermissibly proselytized for or endorsed religion, the Court views the government expression from the perspective of a reasonable observer who is acquainted with the full context of the expression, including any statutory text, history, and implementation. *See Santa Fe Indep. Sch. Dist.* v. *Doe*, 120 S. Ct. 2266, 2278, 2283 (2000); *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

1. The historical context of the federal Christmas holiday demonstrates that the holiday is permissible.

Here, the reasonable observer would know that there is a lengthy, "unbroken history," *Lynch*, 465 U.S. at 674, of

recognizing Christmas as a state and federal holiday. Congress began legislating Christmas as a public holiday for the District of Columbia in 1870, providing:

> That the following days, to wit: The first day in January, commonly called New Year's day, the fourth day of July, the twenty-fifth day of December, commonly called Christmas day, and any day appointed or recommended by the President of the United States as a day of public fast or thanksgiving, shall be holidays within the District of Columbia, and shall, for all purposes of presenting for payment or acceptance for the maturity and protest, and giving notice of the dishonor of bills of exchange, bank checks and promissory notes or other negotiable or commercial paper, be treated and considered as is the first day of the week, commonly called Sunday, and all notes, drafts, checks, or other commercial or negotiable paper falling due or maturing on either of said holidays shall be deemed as having matured on the day previous.

Act of June 28, 1870, ch. 167, 16 Stat. 168.

In an 1885 joint resolution respecting holiday payment for federal workers, Congress allowed "the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States . . . the following holidays, to wit: . . . the twenty-fifth day of December, . . . and shall receive the same pay as on other days." J. Res. of Jan. 6, 1885, No. 5, 23 Stat. 516.

In 1894, the fifty-third Congress began the process, which continues with the statute at issue here, of enumerating the public holidays:

> That the first Monday of September in each year, being the day celebrated and known as Labor's Holiday, is hereby made a legal public holiday, to all intents and purposes, in the same manner as Christmas, the first day of January, the twenty-second day of February, the thirtieth day of May, and the fourth day of July are now made by law public holidays.

Act of June 28, 1894, ch. 118, 28 Stat. 96.[4]

The individual States have recognized the legal status of Christmas even longer. All States recognize Christmas as a holiday. The first was Alabama in 1836, followed soon by Louisiana and Arkansas in 1838. Ohio recognized the holiday in 1857. *See generally* BARNETT, THE AMERICAN CHRISTMAS 20 (1954) (listing dates of first legal recognition of Christmas Day by States and Territories). For more than a century and a half, these provisions have allowed such accommodations as the closing of state government offices, banks, and schools.

Christmas has been legally recognized in myriad other ways. Alabama did not require convicts to work on Christmas Day. Alabama Acts 1894-95, p. 858, § 40 (cited in *Sloss Iron & Steel Co. v. Harvey*, 22 So. 994, 994 (1898)). Many states specifically forbade the sale of liquor on Christmas, *see, e.g., People v. Thielman*, 72 N.W. 1102, 1102 (Mich. 1897), and courts have long been closed. *See, e.g., Tice v. Frazier*, 49 P. 1038 (Ore. 1897) (interpreting an 1862 statute which read "The courts of justice may be held, and judicial business may be transacted, on any day, except as provided in this section. No

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[4]The federal Bankruptcy Act similarly "exclude[d] . . . Christmas Day, . . . from the computation of time within which any act shall be done under that law." Act of 1867, § 48, 14 Stat. 540; *In re McGlynn*, 16 F. Cas. 122 (D. Mass. 1872); *In re Lang*, 14 F. Cas. 1097 (D. Mass. 1869).

court can be opened, nor can any judicial business be transacted on . . . Christmas Day," GEN. LAWS OR. 1843-1872, ch. 11, tit. 7, § 899); *In re Worthington*, 30 F. Cas. 641 (W.D. Wisc. 1877) ("the 25th day of December and the 1st day of January are declared to be holidays"). In short, the reasonable observer would know of the "history and ubiquity," *Allegheny,* 492 U.S. at 630-31 (O'Connor, J., concurring), of government recognition of Christmas.

2. The contemporaneous context of the federal Christmas holiday demonstrates that the holiday is permissible.

Just as importantly, a reasonable observer would know that Christmas is only one in a broad and diverse array of government holidays, religious and nonreligious alike. In particular, such an observer would know that the statute instituting the federal Christmas holiday, 5 U.S.C. § 6103, marks not only that Christian holiday, but the more generically religious Thanksgiving holiday, secular holidays with some religious overtones (Memorial Day and Veterans Day), secular holidays with ethnic overtones (Martin Luther King, Jr.'s Birthday and Columbus Day), secular holidays with patriotic overtones (George Washington's Birthday and Independence Day), a secular holiday with primarily economic significance (Labor Day), and a secular holiday that simply marks the new calendar year (New Year's Day). *See* 5 U.S.C. § 6103. Like the diverse elements in the visual displays approved in *Lynch* and *Allegheny,* the varied cultural celebrations here provide the context necessary to dispel any notion of government proselytizing or endorsement. *See Lynch* v. *Donnelly,* 465 U.S. 668 (1984); *County of Allegheny* v. *American Civil Liberties Union Greater Pittsburgh Chapter,* 492 U.S. 573 (1989).

Seen in this context, government acknowledgement of holidays with special significance to some religious groups is

thus no more problematic than its recognition of holidays with special significance to certain ethnic groups. The Establishment Clause's prohibition on religious preferences is coextensive with that against racial and ethnic preferences found in the Fifth and Fourteenth Amendments. *Compare Larson* v. *Valente,* 456 U.S. 228, 246 (1982) (applying strict scrutiny to sect preferences), *with Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (applying strict scrutiny to racial preferences), *and Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (applying strict scrutiny to racial or ethnic preferences) (plurality opinion of Powell, J.).

The government may no more prefer Irish-Americans to English-Americans than it may prefer Christians to Buddhists. Nevertheless, no one seriously argues that government celebrations of St. Patrick's Day are a constitutional affront to Anglophiles. Nor do we entertain lawsuits by European-Americans seeking to enjoin African-American History Month. The reason is plain: in the context of the vast cultural offerings of our federal, state, and local governments, no one could reasonably suppose that any one holiday honoring any particular ethnicity is a government declaration of ethnic preference. For precisely the same reason, government recognition of particular religious celebration—whether it be Ramadan or a Hindu New Year in Jersey City, New Jersey, *see, e.g., ACLU* v. *Schundler,* 168 F.3d 192 (3d Cir. 1999), the federal recognition of Christmas at issue here, or the government's erecting a menorah on the Ellipse for Hannukah—are not declarations of religious preference. Rather, they, like a government's various ethnic offerings, are simply small pieces in a larger mosaic of cultural diversity.

C. The federal Christmas holiday satisfies the three-part *Lemon* test.

Application of the criteria set out in *Lemon* v. *Kurtzman,*

403 U.S. 602 (1971), leads to the same conclusion. The Christmas holiday: (1) has a secular legislative purpose; (2) has a principal or primary effect that neither advances nor inhibits religion; (3) does not foster excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13.

Granting holidays of societal significance is itself, and without more, a valid secular purpose. *See McGowan* v. *Maryland*, 366 U.S. 420, 449-51 (1961). However, since the Christmas holiday may also be viewed as an accommodation of religion, it is well-established that reducing governmental interference with voluntary religious exercise—here of federal employees—is a secular purpose. *See Presiding Bishop of the Church of Jesus Christ of Latter Day Saints* v. *Amos*, 483 U.S. 327, 335 (1987).

Second, giving federal employees the day off—even with knowledge that some will use that free time for religious worship—does not have the effect of positively advancing religion within the meaning of the Establishment Clause. *See Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617, 628-29 (1961) (noting that Sunday closing laws are valid "even if the day [of rest] thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity") (internal quotations omitted). Instead, the government's accommodation simply acknowledges the existence of this religious exercise and avoids stifling it. *Zorach*, 343 U.S. at 314 ("When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.")

Finally, legal holidays involve no governmental surveillance of or intrusion into religious affairs that typically supports a finding of "excessive entanglement." *See Walz* v.

Commissioner, 397 U.S. 664, 675 (1970). *But cf. Agostini* v. *Felton,* 521 U.S. 203, 232-33 (1997) (treating "excessive entanglement" inquiry as part of "effects" inquiry). Indeed, the government's providing a day off avoids interference with religious exercise, and so inherently *disentangles* government and religion. *See Amos,* 483 U.S. at 340.

Thus, providing a legal holiday for Christmas is fully constitutional, no matter which Establishment Clause standard is applied. Instead, the holiday falls within government's broad authority to express acknowledgement of, and to accommodate, voluntary religious exercise. All levels of American government are—and have been for a very long time—in the business of celebrating and accommodating culturally significant days, religious and nonreligious alike. This case represents a perfect illustration of why that practice is plainly constitutional.

CONCLUSION

For the foregoing reasons, the Court should deny the plenary review that Petitioner requests, and instead affirm the decision below by summary disposition on the merits. *See* Rule 16.1; *see, e.g., Stone* v. *Graham*, 449 U.S. 39 (1980) (per curiam).

Respectfully submitted,

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